IN THE DISTRICT OF COLUMBIA COURT OF GENERAL SESSIONS

CIVIL DIVISION

STATE OF LOUISIANA	)	
	)	
v.	)	Criminal No. 825-68 A
	)	
CLAY L. SHAW	)	

RESPONSE TO ORDER TO SHOW CAUSE
DIRECTED TO JAMES B. RHOADS,
ARCHIVIST OF THE UNITED STATES

Statement

Pursuant to 23 D.C. Code Section 802, Dr. James B. Rhoads was directed to show cause why an order should not be entered requiring him to appear as a witness in the Criminal District Court, Parish of Orleans, in the case of State of Louisiana v. Clay L. Shaw on the 21st of January 1969.

The order to show cause recites that it was based upon a certificate from the Criminal District Court, Parish of Orleans. The basis for seeking the appearance of Dr. Rhoads is stated in paragraph 2 of the certificate as follows:*

> That Dr. James B. Rhoads, Archivist for the United States of America, or his successor in office, has possession of the following described photographs and X-rays, to-wit:
>
> > Forty-five (45) photographs (22 color photographs and 23 black and white photographs) and twenty-four (24) X-rays which were taken before and during the autopsy of John F. Kennedy on November 22, 1963, at the United States Naval Hospital at Bethesda, Maryland. These photographs and X-rays are now located in the National Archives in Washington, D.C., under the control of Dr. James B. Rhoads, or his successor in office.

Section 802 of 23 D.C. Code provides that a prospective witness summoned under its provisions shall be given a hearing and that he may be required to attend and testify in the out of state court where the prosecution is pending:

* The accuracy of the description in the certificate is, of course not conceded.

> If at such hearing the judge determined that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution or a grand jury investigation in the other State, and that the laws of the State in which the prosecution is pending, or grand jury investigation has commenced or is about to commence and of any other State through which the witness may be required to pass by ordinary course of travel, will give to him protection from arrest and the service of civil and criminal process . . . . [23 D.C. Code Section 802.]

Dr. Rhoads respectfully opposes the issuance of a summons requiring his appearance in Louisiana upon the grounds that he has no personal knowledge of the facts relating to the assassination of President Kennedy; that the specific provisions of 44 U.S.C. 397 preclude disclosure of the photographs and X-rays identified in the certificate filed in support of the request; that the doctrine of federal sovereignty precludes requiring the Archivist to appear as a witness in a state court where the only basis for such appearance is his alleged custody of archival materials; that the so-called Out-of-State Witness Act, 23 D.C. Code 801, et seq., does not extend to the production of the photographs and X-rays; that the Court in this proceeding lacks jurisdiction to control the official acts of the Archivist of the United States; and that to require Dr. Rhoads' attendance would cause undue hardship.

The Court is respectfully referred to the affidavit of Dr. Rhoads attached hereto and made a part hereof. From this affidavit, it clearly appears that Dr. Rhoads has no personal knowledge of the matters relating to the assassination of President Kennedy and that the photographs and X-rays referred to in the certificate cannot be made available by him. Accordingly, no summons should be issued under the provisions of 23 D.C. Code Section 802.

Facts

Dr. James B. Rhoads has custody of the materials requested in

his official capacity as Archivist of the United States, pursuant to a letter agreement entered into by the legal representative of the Executors of the estate of John F. Kennedy and the Administrator of General Services on October 29, 1966. The letter agreement is attached to Dr. Rhoads' affidavit. It provides in pertinent part:

> The family desires to prevent the undignified or sensational use of these materials (such as public display) or any other use which would tend in any way to dishonor the memory of the late President or cause unnecessary grief or suffering to the members of his family and those closely associated with him. We know the Government respects these desires.
>
> Accordingly, pursuant to the provisions of 44 U.S.C. 397(e)(1), the executors of the estate of the late President John F. Kennedy hereby transfer to the Administrator of General Services, acting for and on behalf of the United States of America, for deposit in the National Archives of the United States, all of their right, title, and interest in all of the personal clothing of the late President now in the possession of the United States Government and identified in Appendix A, and in certain X-rays and photographs connected with the autopsy of the late President referred to in Appendix B, and the Administrator accepts the same, for and in the name of the United States, for deposit in the National Archives of the United States, subject to the following restrictions, which shall continue in effect during the lives of the late President's widow, daughter, son, parent, brothers and sisters, or any of them:
>
> II
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> * * * * *
>
> (2) Access to the . . . materials[1/] shall be permitted only to:
>
> (a) Any person authorized to act for a committee of the Congress, for a Presidential committee or commission, or for any other official agency of the United States Government, having authority to investigate matters relating to the death of the late President, for purposes within the investigative jurisdiction of such committee, commission or agency.
>
> (b) . . . no access . . . shall be authorized until five years after the date of this agreement except with the consent of the Kennedy family representative designated . . . .

1/ The materials referred to are specified in Appendix B to the letter agreement. The Appendix B materials include those enumerated in Judge [illegible]'s certificate.

* * * * *

VI

The Administrator shall impose such other restrictions on access to and inspection of the materials transferred thereunder, and take such further actions as he deems necessary and appropriate (including referral to the Department of Justice for appropriate legal action), to fulfill the objectives of this agreement and his statutory responsibility under the Federal Property and Administrative Service Act of 1949, as amended, to provide for the preservation, arrangement and use of materials transferred to his custody for archival administration. 2/

For the reasons given below, the Archivist of the United States submits that the Court should not require him to attend the Louisiana proceedings.

ARGUMENT

I. THE PROVISIONS OF 44 U.S.C. 397 PRECLUDE DISCLOSURE OF THE PHOTOGRAPHS AND X-RAYS IDENTIFIED IN THE CERTIFICATE.

No suggestion has been made that Dr. Rhoads has any personal knowledge with respect to the matters in trial in Louisiana and his affidavit establishes that he has none. The sole basis indicated in Judge Haggerty's certificate for summoning Dr. Rhoads is that he has possession of the photographs and X-rays held under agreement pursuant to the provisions of 44 U.S.C. 397.

Section 397 of 44 U.S.C. provides in pertinent part:

(e) The Administrator is authorized . . . to accept for deposit--

(1) the papers and other historical materials of any President or former President of the United States, or of any other official or former official of the Government, and other papers relating to and contemporary with any President or former President of the United States, subject to restrictions agreeable to the Administrator as to their use; and

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2/ The Archivist has been delegated all responsibility for the care and custody of documents and articles in the Archives. GSA Order No. ADM 5450.39 (Chapter 8, Para. 1(a)(3)), dated May 5, 1964. Paragraph VIII of the letter agreement authorized the Administrator of General Services to delegate his authority thereunder to the Archivist.

* * * * *

> (f)(3) . . . papers, documents, or other historical materials accepted and deposited under subsection (e) of this section and this subsection shall be held subject to such restrictions respecting their availability and use as may be specified in writing by the donors or depositors, including the restrictions that they shall be kept in a Presidential archival depository, and such restrictions shall be respected for so long a period as shall have been specified, or until they are revoked or terminated by the donors or depositors or by persons legally qualified to act on their behalf with respect thereto: [Emphasis added.]

It is clear that Congress is empowered to provide by legislation for the acceptance of gifts subject to conditions and restrictions specified by a donor, and that such conditions will be respected by the courts. Story v. Snyder, 184 F.2d 454, 456 (C.A.D.C., 1950), cert. denied, 340 U.S. 866.[3/]

In the case at bar, pursuant to 44 U.S.C. 397, the X-rays and photographs enumerated were accepted subject to limitations. The letter agreement provides:

> . . . no access to the Appendix B materials [which include the X-rays photographs] pursuant to this paragraph II(2)(b) shall be authorized until five years after the date of this agreement except with the consent of the Kennedy family representative designated. . . .

This limitation forbade access to the materials until five years after the date of this agreement except with the consent of the Kennedy family representative designated. There is no suggestion that the Kennedy family representative has consented to the disclosure of the X-rays and photographs in question, and, accordingly, the Archivist has no authority to produce the articles enumerated in the certificate.

As noted by Dr. Rhoads' affidavit, the authority of the National Archives and Records Service to accept gifts of papers

3/ Even in the absence of a statute barring access the Government has a privilege to refuse access to materials received in confidence. Frobby v. Zuckert, 316 F.2d 336 (D.C. Cir. 1963), cert. denied, 375 U.S. 855; Reform Air Cleaner and Chemical Corp. v. United States, 157 F. Supp. 939 (Ct. Cl. 1958); Parker v. Salyerson (C.A.D.C., decided June 28,

and other articles subject to whatever conditions of limited access may be requested by the donor ensures that during the period when a degree of sensitivity attaches to discussion of events and personalities, the rights of privacy of the donor and of persons discussed in the papers are fully protected. It also ensures that valuable collections of papers will be saved, and with the passage of an appropriate period of time willbe made available to writers, scholars, and other interested persons for research use. If this protection is removed by order of court or otherwise, the public confidence in the Federal Government to honor its commitments to such donors will be destroyed.

Public figures, no longer assured that their interests will be protected when their papers are deposited in public institutions, will cease to place important and sensitive papers in such institutions. The result will be a drying-up of basic research in history, economics, public administration, and the social sciences generally.

The letter agreement, page 1, provides that it is expressly entered into "pursuant to the provisions of 44 U.S.C. 397(e)(1)." It is clear from the statutory provisions recited above that this agreement is "subject to restrictions agreeable to the Administrator as to their use." The statute's legislative history dispels any possible doubt that the restriction in the present case is within

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3/ (cont'd) 1958, No. 20478). In addition to the foregoing, the papers, production of which is sought here, relate to the Presidency, the essence of the Executive Branch. Under the constitutional doctrine of separation of powers, the judicial branch may not intrude upon the papers of the Presidency without the consent of the Executive Branch. Cf. Marbury v. Madison, 1 Cranch. 137. Accordingly, the documents here sought are protected from production not only by the statutory authority but also by the constitutional principles of sovereign immunity, separation of powers, and eventually executive privilege.

the terms and purposes of the statute. The House Report affirms:

> [Such materials are to be held] subject to such restrictions respecting their use as may be specified in writing by the donors or depositors, including the restrictions that they shall be kept in a Presidential archival depository, and to enforce such restrictions for so long a period as shall have been specified, or until they are revoked or terminated by the donors or depositors or by persons legally qualified to act on their behalf with respect thereto. These provisions make it clear that the Administrator, once having come to agreement with the donor on restrictions as to use, in accordance with subsection (e), has the authority to enforce such restrictions. Authority to agree to, and to enforce, certain restrictions as to access and use is essential if private papers are to come into public custody at all. [House Report 998, 84th Cong., 1st Sess., p. 6.]

II. THE DOCTRINE OF FEDERAL SOVEREIGNTY PRECLUDES REQUIRING THE ARCHIVIST TO APPEAR AS A WITNESS IN A STATE COURT WHERE THE ONLY BASIS FOR SUCH APPEARANCE IS HIS ALLEGED CUSTODY OF ARCHIVAL MATERIALS.

By these proceedings the State of Louisiana is seeking access to materials delivered to the National Archives under assurances that access to the materials would be restricted. The Federal Government has lawfully entrusted the Archivist of the United States with responsibility for the materials. He is obligated as part of his responsibilities to respect the letter agreement provisions maintaining the confidentiality of the materials.

No state authority can interfere with the official actions of a federal officer. "[H]is conduct can be controlled only by the power that created him", M'Clung v. Silliman, 6 Wheat. (19 U.S.) 598, 605. Thus, federal officers are free to provide for shipment of Government employees' goods without complying with state regulations, United States v. Georgia Public Service Commission, 371 U.S. 285 (1963); may determine whether a statute giving a state lands "no longer needed" includes lands obtained by the United States through purchase or gift without entitling the state to judicially

question such decision, Hawaii v. Gordon, 373 U.S. 57 (1963); and can contract with private persons, state limitations on the private persons' right to contract notwithstanding, Leslie Miller, Inc. v. Arkansas, 352 U.S. 187 (1956). State courts mindful of the separate sovereignty of the federal Government "will not attempt to intrude upon the province of the federal authorities by the making of an order to divulge such confidential information. * * * [such an order] would be a mere futility." Jacoby v. Delfiner, 51 N.Y.S.2d 478, 479, 183 Misc. 280 (Sup. Ct. 1944), affirmed, 63 N.Y.S.2d 833, 270 App. Div. 1014.

The basis of this rule is that "It is elementary that the Federal Government in all its activities is independent of state control. This rule is broadly applied." Jaybird Mining Co. v. Weir, 271 U.S. 609, 613 (1926). Thus, state judicial processes are ineffectual to divert property in the custody of a federal officer from the place where the officer holds it. Buchanan v. Alexander, 4 How. (45 U.S.) 19. As in United States v. Owlett, a state may not interfere

> . . . with the proper governmental function of the United States of America. The complete immunity of a federal agency from state interference is well established. . . . This principle of immunity from state control or interference applies to official papers and records of the United States of America, . . . and prevents a state from obstructing or interfering with employees of the United States of America in the discharge of their official duties, whether or not there is any expressed statutory provision for immunity. [United States v. Owlett, 15 F. Supp. 736 (M.D. Pa., 1936).]

The rule was early summarized by the Supreme Court as follows:

> [T]he sphere of action appropriate to the United States is as far beyond the reach of the judicial process issued by a State judge or a State court, as if the line of division was traced by landmarks and monuments visible to the eye. [Ableman v. Booth, 21 How. (62 U.S.) 505, 516.]

Louisiana's attempt to use its court's proceedings to reach a federal officer must fail since "that authority which is supreme must control, not yield to that over which it is supreme." McCulloch v. Maryland, 4 Wall. (17 U.S.) 315, 424; United States v. McLeod, 385 F.2d 734, 751-2 (C.A. 5, 1967).

III. THE OUT-OF-STATE WITNESS ACT, 23 D.C. CODE 801, ET SEQ., DOES NOT APPLY TO ARTICLES SUCH AS ARE INVOLVED IN THIS CASE.

Paragraph 2 of the certificate states that the only reason for requiring Dr. Rhoads to testify in Louisiana is to compel him to produce materials in his custody. The Out-of-State Witness Act (23 D.C. Code 801, et seq.) authorizes this Court to ". . . issue a summons . . . directing the witness to attend and testify in the court where the prosecution is pending. . ." 23 D.C. Code 802(b).

Nowhere does the Act make provision for the production of documents or other articles. In re Grothe, 208 N.E.2d 581 (D.C. App. Ct. 1965), the court's well-reasoned analysis compels the conclusion that documents in a person's custody may not be obtained under such an Act:

> We are also of the opinion that the trial court exceeded its statutory authority when it ordered respondent to produce documents in his custody. The definition of "summons" as used in the act includes "a subpoena, order or other notice requiring the appearance of a witness." [Emphasis supplied.] Ill. Rev. Stat. ch. 38 § 156-1. This is language which is tailored rather exactly to describe a subpoena ad testificandum, and does not include the characteristics of a subpoena duces tecum. It would have been simple, indeed, for the statute to make it clear that both types of subpoena were covered, if this had been the intention of the legislature.
>
> Other than by what we consider to be the clear meaning of the language employed, we are also impressed by the fact that the statutory protection from arrest and the service of civil and criminal process is for the benefit of the witness only and does not extend to

> any documents which he might have in his custody. When, as in the instant case, the documents are not the property of the respondent, they might be taken from him by civil process or he might be ordered to turn them over to a court or grand jury. Such a result would be so manifestly inconsistent with the general purpose of the statute that we consider it to fortify our conclusion that a summons in the nature of a subpoena duces tecum was not contemplated.
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> On this point we are aware of the fact that a New Jersey court worthy of the highest respect has reached the opposite conclusion. In re Saperstein, 30 N.J. Super. 373, 104 A. 2d 842, 845. We are, of course, not restricted in our deliberation by the background of local case law, cited in the New Jersey opinion, which appears to have influenced that court's decision. Nor do we seem to employ the same general approach in construing the statute. As stated near the beginning of our opinion, we believe that this type of legislative enactment calls for strict construction. [In re Grothe, supra, at p. 586.]

For the cogent reasons expressed in the Grothe case, Dr. Rhoads should not be compelled to attend in a Louisiana court where the only alleged basis for such attendance is his possession of photographs and X-rays.

IV. THE COURT LACKS JURISDICTION TO CONTROL THE OFFICIAL ACTS OF THE ARCHIVIST OF THE UNITED STATES.

The Out-of-State Witness Act (23 D.C. Code 801, et seq.) does not grant jurisdiction to compel the attendance of witnesses in violation of specific statutes such as 44 U.S.C. 397. In United States v. Wittek, 337 U.S. 346, at 359 (1949), the Supreme Court recognized that general acts of Congress do not impose limitations upon the Government itself without a clear provision doing so. In the Wittek case, the District of Columbia Emergency Rent Act was held not applicable to the United States as landlord. In the present case, the general rule relating to witnesses, of course, cannot override a clear congressional directive.

The courts of the District of Columbia have recognized a distinction between the functions of the District of Columbia and the

Government. See United States v. Mills, 11 App.D.C. 500 (D.C. Ct. App. 1897); Burke v. United States, 103 A.2d 347 (D.C. Mun. Ct. App. 1954). In the Mills case, the Court said:

> . . . And when we consider the impropriety of the interference of such an officer as a United States Commissioner with the well-defined and specific sentence of a judicial tribunal, and the class of offenders and offences cognizable in the Police Court, we can not think that it was at all the intention of Congress in any manner to authorize such interference with the sentences of the Police Court of the District of Columbia . . . . [P. 509.]

Moreover, the regulations relating to the use of records in the Archives which are binding upon Dr. Rhoads specifically forbid the use of material except ". . . subject to all conditions specified by the donor or transferor of such materials. . . ." 33 F.R. 4487 Subpart 105-61.202(a) incorporated in Section 105-60.7012(b) and 60.702(a) (33 F.R. 4484-5).

It is entirely clear that courts lack jurisdiction to require the disclosure of documents in violation of such regulations.[4/] See Touhy v. Ragen, 340 U.S. 462 (1951); Saunders v. Great Western Sugar Co., 396 F.2d 794 (C.A. 10, 1968); North Carolina v. Carr, 264 F. Supp. 75 (D.C. W.D. N.C., 1967), appeal dismissed, 386 F.2d 129.

The District of Columbia Court of General Sessions is a court of limited jurisdiction charged with responsibility subject to the statutes of the United States.

V. TO REQUIRE THE ARCHIVIST OF THE UNITED STATES TO ATTEND PROCEEDINGS IN LOUISIANA WOULD RESULT IN UNDUE HARDSHIP.

4/ Indeed custody of the material sought properly reposing in the representative of the federal sovereign, any suit to direct the activities of the representative or to compel release of the materials is a suit against the United States to which it has not consented. No court has subject matter jurisdiction over such a suit. Hawaii v. Gordon, 373 U.S. 57 (1963).

Dr. Rhoads attests in his affidavit that it would be an undue hardship on him and would hinder performance of his official duties if he were required to leave his post on short notice and attend proceedings in Louisiana. To require a witness to attend a hearing in Louisiana in the circumstances here present is not only inconsistent with the purposes of the Out-of-State Witness Act (see United States ex rel. Pennsylvania v. McDevitt, 194 A.2d 740 (D.C. Ct. Mun. App. 1963); In re Mayers, 169 N.Y.S. 2d 839 (N.Y. Ct. of Gen. Sess. 1957)) but would also raise the constitutional questions which the dissenting judges adverted to in New York v. O'Neill, 359 U.S. 1, at 12. Under the Uniform Witness Act as enacted in the District of Columbia, the court must determine for itself whether "undue hardship" would be caused by granting the relief sought by the moving party. 23 D.C. Code 802. Where undue hardship is present, as in the instant proceeding, the statute requires the Court to refuse the compulsory order sought. United States, ex rel. Pennsylvania v. McDevitt, 195 A.2d 740 (D.C. Ct. Mun. App. 1963).

Although, for the reasons heretofore stated the Archivist cannot lawfully be required to furnish to the Louisiana State court the desired photographs and X-rays, counsel for the defendant, in the interest of justice, is able to report to this Court and to all interested parties the availability of certain information concerning the nature and contents of the photographs and X-rays as follows:

Pursuant to paragraph II(2) of the letter agreement between the Administrator of General Services and the legal representative of the executors of the estate of the late President, John F. Kennedy, the X-rays and photographs referred to in these proceedings

were, at the direction of the Attorney General, officially examined by the autopsy surgeons on the 26th day of January 1967. These doctors were:

Dr. James J. Humes
22101 Moross Road
Detroit, Michigan

Dr. J. Thornton Boswell
11134 Stephalee Lane
Rockville, Maryland

Dr. Pierre A. Finck
7541 14th Street, N. W.
Washington, D. C.

These doctors made a report of their findings, a copy of which is attached hereto.

To further assure the preservation of a record concerning the nature and contents of the X-rays and photographs, particularly in the light of the restrictions contained in the letter agreement, and at the written suggestion of Dr. Boswell (see attached letter dated January 26, 1968) the Attorney General, as provided by the letter agreement, constituted a panel of three pathologists and one radiologist, nominated in the first instance by the presidents of three major universities and by the president of the College of American Pathologists. This panel consisted of:

Dr. Alan R. Moritz
2040 Adelbert Road
Cleveland, Ohio

Dr. Russell H. Morgan
Chief of Radiology
Johns Hopkins University
Baltimore, Maryland

Dr. Russell S. Fisher
Medical Examiner
700 Fleet Street
Baltimore, Maryland

Dr. William Carnes
Utah University Medical Center
Salt Lake City, Utah

A lawyer, Bruce Bromley, 1 Chase Manhattan Plaza, New York City, nominated by the President of the American Bar Association, was designated by the Attorney General to assist the panel in the preparation of a report of their findings and conclusions. No member of this panel had any connection with the autopsy or with the Warren Commission.

Their examination of the X-rays and photographs was made on February 26 and 27, 1968, and a copy of their findings is attached hereto.

CONCLUSION

For the foregoing reasons, the Court is respectfully requested to refuse to compel Dr. Rhoads to attend proceedings in Louisiana.

EDWIN L. WEISL, JR.
Assistant Attorney General

DAVID G. BRESS
United States Attorney

JOSEPH M. BARNON
Assistant United States Attorney

JEFFREY F. AXELRAD
Attorneys, Department of Justice

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